Ooi Lean Chai v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-139 OF 1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
10 MAY 1991

Criminal Procedure — Retrial — Charge of trafficking in dangerous drug — Chemist's report served at the earlier trial — Chemist's report held not correct at earlier trial — Chemist's report not re-served for the retrial — Chemist not called to give evidence — Whether chemist's report inadmissible — Dangerous Drugs Act 1952, ss 2 & 39B — Criminal Procedure Code (FMS Cap 6), s 399(i)

Words and Phrases — 'Retrial' — Courts of Judicature Act 1964, s 60

In this case the accused had originally been convicted on a charge of trafficking in heroin and 6-monoacetylmorphine (see [1990] 2 CLJ 656). At the original trial, the chemist's report had been duly served on the accused but the Supreme Court allowed his appeal against conviction on the ground that the chemist's report was incorrect in stating that 6-monoacetylmorphine was a dangerous drug, as in fact it was not so listed at that time. The Supreme Court ordered a retrial.

At the retrial, the accused was charged only for trafficking in heroin. At the retrial the prosecution relied on the same chemist's report but this had not been re-served on the accused. The chemist was not called to give evidence at the retrial. The accused was convicted (see [1991] 1 MLJ 189) and he appealed against his conviction.

Held, allowing the appeal and quashing the appellant's conviction:

(1) A retrial means a new or fresh trial. The retrial could not be treated as a continuation of the first vitiated trial and whatever was done by the prosecution during the earlier trial towards proving the essential ingredients of the charge, such as service of the notice under s 399(i) of the Criminal Procedure Code, must be ignored as non-existent and of no effect.

(2) It is settled law that the proviso to s 399(i) of the Criminal Procedure Code is a condition precedent and if not compiled with, the chemist's report cannot be admitted as evidence without calling the chemist to produce it. The section is not merely a procedural provision but it contained rules of admissibility of the chemist's report.

(3) In this case, as the chemist's report was not re-served on the accused at the retrial, it was inadmissible and therefore was not evidence before the court that the subject matter of the charge was heroin within the meaning of s 2 of the Dangerous Drugs Act 1952.

[Bahasa Malaysia summary

Di dalam kes ini orang yang dituduh telah pada mulanya disabitkan atas kesalahan mengedar heroin dan 6-monoacetylmorphine (lihat [1990] 2 CLJ 656). Di perbicaraan asal itu, laporan pegawai kimia telah disampaikan dengan sempurna kepada yang dituduh, akan tetapi kemudiannya Mahkamah Agung telah membenarkan rayuannya atas alasan laporan pegawai kimia itu tersilap menyebutkan 6-monoacetylmorphin itu sebagai dadah berbahaya sungguhpun pada masa itu ia tidak disenaraikan sedemikian. Mahkamah Agung telah memerintahkan yang dituduh dibicara semula. Di perbicaraan semula itu yang dituduh telah dituduh hanya untuk mengedar heroin. Di perbicaraan semula itu pihak pendakwa bergantung kepada laporan yang asal yang diberi oleh pegawai kimia, akan tetapi laporan itu tidak disampaikan semula kepada yang dituduh. Pegawai kimia itu juga tidak dipanggil memberi keterangannya di perbicaraan semula itu. Yang dituduh telah disabitkan dengan kesalahan atas tuduhan terhadapnya (lihat [1991] 1 MLJ 189) dan ia telah merayu.

Diputuskan, membenarkan rayuan itu dan membebaskan perayu:

(1) Sesuatu perbicaraan semula adalah perbicaraan yang baharu. Ia tidak boleh dianggapkan sebagai lanjutan kepada perbicaraan awal yang telah diketepikan dan apa jua yang telah dilakukan oleh pihak pendakwa di perbicaraan dahulu itu untuk membuktikan butir-butir penting mengenai tuduhan itu, seperti penyampaian notis di bawah s 399(i) Kanun Acara Jenayah, hendaklah tidak diambilkira dan dianggap tidak berlaku dan tidak berkesan.

(2) Adalah menjadi undang-undang yang ternyata bahawa proviso kepada s 399(i) Kanun Acara Jenayah adalah syarat terdahulu dan jika ia tidak dipatuhi, laporan pegawai kimia tidak boleh diterima sebagai keterangan tanpa memanggil pegawai kimia itu untuk mengemukakannya. Seksyen itu bukan hanya peruntukan acara, akan tetapi mengandungi kaedah-kaedah mengenai kebolehterimaan laporan pegawai kimia.

(3) Di dalam kes ini oleh kerana laporan pegawai kimia itu telah tidak disampaikan semula kepada yang dituduh di perbicaraan semula, ia tidak boleh diterima sebagai keterangan dan oleh kerana itu tidak terdapat apa-apa keterangan diberi kepada mahkamah bahawa barang yang disebut di dalam tuduhan itu adalah heroin mengikut takrif yang diberi di dalam s 2 Akta Dadah Berbahaya 1952.]

Cases referred to

1 *PP* v *Lim Chen Len* [1981] 2 MLJ 41 (folld)
2 *Chah Siew Kok* v *PP* [1987] 1 CLJ 386 (refd)
3 *AG* v *Kelly* (No 2) (1938) IR 109 (refd)
4 *Mohamed bin Abdul Rahman* v *PP* [1979] 1 MLJ 252 (distd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code (FMS Cap 6) s 399(i)
Dangerous Drugs Act 1952 ss 2, 39B

Appeal from: Criminal Trial No 47-11 of 1990 (High Court, Johore Bahru)

Teh Poh Teik for the appellant.
CT Wong (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): At a retrial, the appellant was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952, in that on 18 August 1983 on or about 7.30pm, he did traffic in dangerous drugs, namely, heroin weighing 51.76g at No 34-B, Jalan Abiad, Taman Sri Tebrau, Johore Bahru, an offence punishable under s 39B(2). He was found guilty and sentenced to death by the learned judicial commissioner on 12 July 1990.

The crucial point taken by the appellant in this appeal was the interpretation of s 399(i) of the Criminal Procedure Code ('the CPC') relating to the admissibil-

ity of a chemist's report produced at his retrial as exh 'P38' to prove that the subject matter of the charge was heroin. In the petition of appeal it was contended that the learned judicial commissioner erred in law in the interpretation of s 399 in holding that there was no requirement on the prosecution to re-serve the chemist's report on the appellant not less than ten clear days before the commencement of the retrial because the report had been so served on him within the requisite time before the commencement of the first trial. There was no dispute that on 13 March 1990, vide Supreme Court Criminal Appeal No 05-43 of 1989, the Supreme Court had allowed the appellant's appeal against conviction and death sentence and had ordered a retrial on the ground that one of the two substances forming the subject matter of the original charge was not 'dangerous drugs' within the meaning of s 2 of the Dangerous Drugs Act 1952, although it was so described in the chemist's report.

The relevant part of s 399(i) provides:

> Any document purporting to be a report under the hand of any of the persons mentioned in subsection (ii) of this section (which includes government chemists) upon any person, matter or thing examined or analysed by him ... may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person ... shall be required to attend as a Witness —
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> (a) by the Court; or
> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
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> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he *shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.* (Emphasis supplied)

It was common ground that in the first trial (unlike the retrial), the accused was charged for trafficking not only in 51.76g of heroin but also 26.98g of 6-monoacetylmorphine at the same place and time as stated in the present charge. In the chemist's report, which was produced under s 399(i) of the CPC at the earlier trial, the report had stated that both the heroin and 6-monoacetylmorphine were 'dangerous drugs' as defined in s 2 of the Dangerous Drugs Act 1952. The argument was put forward in the first appeal which was accepted by the Supreme Court that what was stated by the chemist in his report was incorrect because at the material time, 6-monoacetylmorphine was not listed as dangerous drugs in the First Schedule of the Act — hence, the order for retrial.

In his grounds of judgment, the learned judicial commissioner had this to say:

> At the close of the prosecution case, the learned defence counsel informed the court that he has only one point to submit relating to the failure of the prosecution to prove its case against the accused. He relied solely on the admissibility of the chemist's report. He based his stand on the fact that the chemist is not called to testify and that the report itself was not correct.
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> He informed the court that it is due to the incorrect statement in the chemist's report that led to the present trial. This case is a retrial ordered by the Supreme Court after allowing an appeal of the accused in Criminal Trial No 10-1984 (I shall refer to this as the first trial). I was to learn later that the learned trial judge found the accused guilty of an almost similar charge under s 39(B)(1) of the Dangerous Drugs Act but of drugs besides heroin included 6-monoacetylmorphine which at the material time was not listed as a dangerous drug under the First Schedule of the Dangerous Drugs Act 1952.
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> The inclusion of 6-monoacetylmorphine in the charge sheet of the first trial was most likely due to the statement made by the chemist on the last page of the chemist's report where the chemist states as follows:
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> > 'Heroin and 6-monoacetylmorphine are 'dangerous drugs' as defined in s 2 of the Dangerous Drugs Act 1952. 6-monoacetylmorphine is an ester of morphine as in Part III of the First Schedule to the above Act'.
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> In the present case, the 6-monoacetylmorphine is left out of the charge and the accused is only charged for trafficking in heroin, (6-monoacetylmorphine has since been listed as a dangerous drug under the First Schedule of the Dangerous Drugs Act).
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> This same chemist's report used in the first trial is now tendered as evidence and marked by this court as 'P38'. The learned deputy public prosecutor felt that there is no necessity to call the chemist and based her stand on the contention that since the chemist's report was served well within the time limit stated in s 399 of the Criminal Procedure Code and that the defence has not given notice to object to the said report to warrant calling the chemist, the report is admissible. There is no necessity of re-serving the same report to the accused in respect of this retrial.

Learned counsel for the appellant submitted that under s 399(i) of the CPC, the chemist's report must be re-served because the word 'trial' included 'retrial'. On the other hand, the learned deputy public prosecutor contended that since the chemist's report had been served on the appellant about seven years ago at the first trial, there was no necessity to re-serve the same all over again. Since the appellant knew of the intention of the public prosecutor to produce the chemist's report, it was for him to give notice under s 399(i)(b) if he so required the attendance of the government chemist.

Learned counsel for the appellant referred us to the case of *PP* v *Lim Chen Len*,[1] where Mohamed Azmi J (as he then was) held at p 42:

> In *Chong Yik* v *PP*, Storr J held that the proviso to s 399(i) of the Criminal Procedure Code is a condition precedent and, if not complied with, the report of the government chemist cannot be admitted. If it is wrongly admitted in evidence, that wrongful admission is an illegality which cannot be cured under s 422 of the Criminal Procedure Code. Similarly, in *Wong Kok Keong* v *R*, Spencer Wilkinson J, in dealing with s 427(1) of the Straits Settlement Criminal Procedure Code (Cap 21), which was in pari materia with s 399(i), held the view that the provisions related to evidence rather than to procedure. After perusing a number of authorities including *Ng Yee*'s case, *Chong*

Yik's case and *Chong Peng* v *Public Prosecutor*, his Lordship said at p 15:

> 'It is clear from all these authorities that where the requisite ten days' notice of the intention to use the certificate has not been given the certificate is inadmissible. The only point upon which the decisions differ is as to the effect of the wrongful admission of such a certificate, and in all the decided cases except one, the wrongful admission has resulted in the conviction being quashed on the ground that there was no other evidence on the crucial point.
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> Thinking, as I do, that the provisions of s 427 are in substance provisions relating to evidence I feel constrained to follow the decisions of Storr J and Bellamy J.'

With respect, I agree that the provision of s 399(i) of the Criminal Procedure Code relates to admissibility of evidence and is not merely procedural.

We agreed that s 399(i) of the CPC was not merely a procedural provision but it contained, inter alia, rules of admissibility of chemist's report which dispensed with the need to call the government chemist as maker of the document as a witness. Learned counsel for the appellant also referred to the case of *Chah Siew Kok* v *PP*[2] where Peh Swee Chin J held that if a chemist's report was admitted in contravention of s 399 of the CPC, it would be an irregularity of a serious nature and the report in such circumstances was inadmissible evidence despite its admission. He also held that a waiver or an estoppel could not be raised against s 399 which imposed a duty on the prosecution to call the chemist as a witness. Further a waiver by an accused person could not be held against him in regard to rules of procedure and evidence in criminal proceedings. Any admission of inadmissible evidence, even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any court to assess.

In our view it is settled law that the proviso to s 399(i) of the CPC is a condition precedent and if not compiled with, the chemist's report cannot be admitted in evidence without calling the government chemist to produce it.

The power of the Supreme Court to order a retrial in criminal appeals is contained in s 60 of the Courts of Judicature Act 1964. In civil appeals, the power to order a new trial is conferred by s 71. The word 'retrial' is defined by *The Oxford Companion to Law* by David M Walker as:

> A fresh trial of a case. In civil cases tried by jury, if the verdict is set aside on appeal as unjustifiable, a retrial is ordered. In criminal cases a retrial may be ordered where the first trial has in truth been only an apparent trial, having been vitiated by a defect so fundamental as to render it a nullity, and also where the Court of Appeal allows an appeal against conviction only by reason of fresh evidence received or available and it appears to the court that the interests of justice require it, it may order a retrial.

In *Stroud's Judicial Dictionary* (4th Ed), the word 'retrial' in the Courts of Justice Act 1928 (Ireland) (No 15 of 1928) means a finished trial, a proceeding in which the guilt or innocence of the accused is determined. Accordingly, where a retrial had been ordered and the jury disagreed, it was held that there had not been a retrial (*AG* v *Kelly (No 2)*[3]).

We are of the view that the word 'retrial' means a new or fresh trial. When the Supreme Court in the first appeal quashed the conviction of the appellant and set aside the death sentence and ordered a retrial, the court was clearly ordering a fresh or new trial against the appellant, the first trial being a nullity. The retrial could not be treated as a continuation of the first vitiated trial, and whatever was done by the prosecution during the earlier trial towards proving the essential ingredients of the charge, such as service of notice under s 399(i) of the CPC, must equally be ignored as non-existent and of no effect. Indeed in this case even the charge at the retrial was different from that of the first trial, and both trials were heard by different corams. In the circumstances, for the purpose of s 399(i) of the CPC, the chemist's report must be served all over again on the appellant, and it was only when there was such a compliance that the report would be admissible notwithstanding the absence of the chemist, and it was only then that the appellant if he so elected, could insist on the chemist to appear in person by giving three clear days notice before the commencement of the retrial. We did not agree with the contention of the learned deputy public prosecutor that during the retrial the prosecution could legally rely on the notice served about seven years ago, ie served ten clear days before the commencement of the first vitiated trial as sufficient compliance with the pre-condition imposed by s 399(i).

In his judgment, the learned judicial commissioner had relied on the case of *Mohamed bin Abdul Rahman* v *PP*.[3] We agreed with the argument of learned counsel for the appellant that the authority was not applicable here because the chemist's report in that case had been properly served on the accused, which meant that the proviso to s 399(i) had been compiled with in that trial.

The condition precedent in s 399(i) is that if the public prosecutor intends to give in evidence the chemist's report, he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial. In our view when the report was served on the appellant before the first trial by the public prosecutor, such intention of producing the chemist's report could only relate to the first trial and could not be extended to the retrial. The public prosecutor when deciding the matter in the earlier prosecution about seven years ago could not possibly have foreseen the retrial ordered by the Supreme Court. In a retrial, it is incumbent on the prosecution to prove its

case all over again beyond any reasonable doubt by evidence in accordance with law. In this particular case, the obligation included the duty to decide whether it intended to prove that the subject matter of the charge was heroin either by calling the government chemist or by invoking the proviso to s 399(i) of the CPC to admit the chemist's report. There was no duty on the part of the appellant to do or assume anything in the conduct of the prosecution. We accordingly held that if the prosecution had for whatever reason intended not to call the government chemist to give evidence at the retrial notwithstanding the serious error discovered in the chemist's report in the earlier appeal, then it must once again comply with the condition precedent imposed by s 399(i) of the CPC in order to render the chemist's report admissible in evidence. The failure by the prosecution to re-serve the chemist's report on the appellant at the retrial was undoubtedly fatal to its case.

For the above reasons we had allowed this appeal by quashing the conviction and setting aside the death sentence. The chemist's report being inadmissible, there was no evidence before the court that the subject matter of the charge was heroin within the meaning of s 2 of the Dangerous Drugs Act 1952. The appellant was accordingly acquitted and discharged.

Appeal allowed and conviction quashed.

Solicitors: *Abdul Rahman Saad & Associates.*

Reported by *Prof Ahmad Ibrahim*

William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-447-90
ABDUL HAMID OMAR LP, HARUN HASHIM AND GUNN CHIT TUAN SCJJ
3 MAY 1991

Civil Procedure — Solicitors — Authority to act challenged — Whether court can order action to be struck out or stay the proceedings and determine issue on application of party by motion or summons

Civil Procedure — Appeal — Fresh evidence at appeal — Direction of appellate court to admit fresh evidence — Courts of Judicature Act 1964, s 69(1)

In this case the appellant had brought an action against the respondents for breach of service contract and breach of fiduciary duty owed to the appellant. At the hearing to set aside the interlocutory injunction which had been granted, the respondents' solicitors orally raised a preliminary objection and questioned the authority of certain solicitors to act for the appellant. The learned judge after hearing submissions by counsel upheld the objection of the respondents and ordered that the appellant's action be struck out. The appellant appealed and applied for leave to adduce fresh evidence.

Held, staying the appeal:

(1) The Supreme Court in hearing an appeal has a full and general discretion to admit fresh evidence under s 69(1) of the Courts of Judicature Act 1964. In this case the court was satisfied as to the reason why the evidence was deliberately not adduced in the court below and the court therefore made an order giving leave for the evidence to be produced.

(2) A challenge to the authority of solicitors may be made at any time and the court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck out if there was sufficient or admitted evidence that there is no action properly before it. But where there is no such evidence, the court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

(3) In the circumstances of this case, the court stayed the appeal and remitted the case to the High Court for the trial judge to hear and consider the challenge on the appellant's solicitors' authority on a substantive application.

[Bahasa Malaysia summary

Di dalam kes ini perayu telah membawa tindakan terhadap responden kerana kemungkiran kontrak perkhidmatan dan kewajipan fidusiari terhadap perayu. Di masa perbicaraan mengenepikan injunksi interlokutori yang telah diberi, peguam responden telah secara lisan menimbulkan bantahan permulaan dan mencabar kuasa peguam-peguam berkenaan bertindak bagi pihak perayu. Hakim yang arif setelah mendengar hujah-hujah peguam telah membenarkan bantahan responden dan beliau telah memerintahkan tindakan perayu itu dibatalkan. Perayu telah membuat rayuan dan memohon kebenaran mengemukakan keterangan baharu.

Diputuskan, menggantungkan rayuan itu:

(1) Mahkamah Agung di dalam mendengar rayuan mempunyai bidang kuasa penuh dan secara am menerima keterangan baharu di bawah s 69(1) Akta Mahkamah Kehakiman 1964. Di dalam kes ini mahkamah berpuashati dengan sebab-sebab mengapa keterangan itu sengaja tidak diberi di mahkamah bawahan, dan oleh kerana itu mahkamah membuat perintah memberi kebenaran supaya keterangan itu diberi.

(2) Cabaran kepada kuasa peguam boleh dibuat pada bila-bila masa dan mahkamah dengan bidang kuasa sedia adanya boleh melayan cabaran yang dibuat secara lisan dan boleh memerintahkan tindakan itu dibatalkan jika terdapat keterangan yang mencukupi atau diakui bahawa tidak ada tindakan yang sah di hadapannya. Akan tetapi apabila tidak terdapat keterangan sedemikian, mahkamah hendaklah hanya menggantungkan prosiding itu dan memutuskan isu ketiadaan kuasa itu atas permohonan pihak dalam kes itu yang dibuat secara usul atau saman.

(3) Di dalam keadaan kes ini, mahkamah telah menggantungkan rayuan dan menghantar balik kes ini kepada Mahkamah Tinggi supaya hakim perbicaraan itu mendengar dan menimbangkan cabaran kepada kuasa peguam perayu di dalam permohonan substantif.]

Cases referred to

1 *Khoo Leong Kee* v *LY Swee Co* [1968] 2 MLJ 104 (distd)
2 *Chin Kok Kwong Construction Sdn Bhd* v *Sunrise Towers Sdn Bhd* [1986] 2 MLJ 41 (distd)
3 *Simmons* v *Liberal Opinion Ltd* [1911] 1 KB 966 (distd)
4 *Richmond* v *Branson & Son* [1914] 1 Ch 968 (folld)
5 *John Shaw & Sons (Salford) Ltd* v *Peter Shaw & John Shaw* [1935] 2 KB 113 (refd)
6 *Ladd* v *Marshall* [1954] 3 All ER 745 (refd)